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No. 87-1568

In the

Supreme Court of the United States

October Term 1987

Allen Transformer Company ..... *Petitioner*

V.

Charles D. Ragland,
Commissioner of Revenues
For the State of Arkansas ..... *Respondent*

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF ARKANSAS

RESPONSE OPPOSING PETITION
FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF ARKANSAS

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STATEMENT OF THE CASE

The Respondent, Charles D. Ragland, Commissioner of Revenues for the State of Arkansas, is responsible for the administration of the Arkansas Gross Receipts (Sales) Tax. The Petitioner, is an Arkansas Corportion engaged in the business of repairing, rewinding and remanufacturing electrical transformers at its location in Fort Smith, Arkansas. The Commissioner audited Petitioner for sales tax for the period April 1, 1977 through March 31, 1983, resulting in an assessment of additional tax, interest and penalty in the amount of $39,361.18. The additional sales tax was assessed on sales of repair services performed by Petitioner at Fort Smith, Arkansas on property which had been shipped into Arkansas from out-of-state by customers located outside Arkansas.

SUMMARY OF ARGUMENT

A.

The imposition of a sales tax on services performed in the taxing state, on property shipped into the taxing state by customers located outside the taxing state, has previously been upheld against an Interstate Commerce Clause challenge in the case of *Department of Treasury v. Ingram-Richardson Manufacturing Company*, 313 U.S. 252, 61 S.Ct. 866, 85 L.Ed. 1313 (1941). *Complete Auto Transit v. Brady*, 430 U.S. 274, 97 S.Ct. 1076, 51 L.Ed.2d 326 (1977) does not apply in this case because this case does not involve an attempt by Arkansas to tax the privilege of carrying on an interstate business operation within Arkansas. Arkansas is seeking to tax only intrastate activity.

B.

State legislatures have wide latitude in adopting tax statutes and tax exemption statutes and the fact that one business is left untaxed and another taxed in order to promote the former or restrict and suppress the later does not violate the Equal Protection Provision of the Fourteenth Amendment.

REASONS FOR DENYING THE WRIT

A.

THE ARKANSAS GROSS RECEIPTS (SALES) TAX, AS APPLIED TO SERVICES PERFORMED WITHIN THE STATE OF ARKANSAS FOR OUT-OF-STATE CUSTOMERS, DOES NOT PLACE A BURDEN ON INTERSTATE COMMERCE IN VIOLATION OF THE INTERSTATE COMMERCE CLAUSE OF THE UNITED STATES CONSTITUTION.

The State of Arkansas has imposed its sales tax under Ark. Stat. Ann. §84-1903 (c) (3) (now codified at Ark. Code Ann. §26-52-301 (3) (c) (i)) upon the:

> "Service of alteration, addition, cleaning, refinishing, replacement, and repair of . . . electrical appliances and devices . . . ."

This tax is being imposed on services performed within this State for out-of-state customers.

The United States Supreme Court has upheld the right of a state to impose a tax upon a service even though the service is being performed for a customer in another state. In *Evco v. Jones*, 409 U.S. 91, 93 S.Ct. 349, 34 L.Ed.2d 325 (1972) the Court stated:

> "Our prior cases indicate that a state may tax the proceeds from services performed in the taxing State, even though they are sold to purchasers in another State. Hence, in *Department of Treasury v. Ingram-Richardson Manufacturing Company*, 313 U.S. 252, 61 S.Ct. 866, 85 L.Ed. 1313 the Court upheld a state gross income tax imposed on a taxpayer engaged in the process of enameling metal parts for its customers. We accepted the finding of the Court below that this was a tax on income derived from services, not from sales of finished products, and we found irrelevant the fact that

> the sales were made to out-of-state customers. The tax was validly imposed on the service performed in the taxing State." 409 U.S. at page 93.

In *Department of Treasury v. Ingram-Richardson Manufacturing Company, supra*, the Court upheld an assessment of sales tax against an Indiana business providing the service of coating parts, which belonged to out-of-state customers, with enamel. The enameled parts were subsequently used by the out-of-state customer in manufacturing electrical appliances. The Court stated:

> "The enameling process was an activity performed at respondent's plant in Indiana and the gross receipts therefrom were taxable by Indiana . . . . The fact that the orders for the enameling were obtained by respondent's agents and contracts were executed outside Indiana did not make the enameling process other than an intrastate activity and any the less a proper subject for the application of the taxing statute." 313 U.S. at page 254.

Complete Auto Transit v. Brady, 430 U.S. 274, 97 S.Ct. 1076, 51 L.Ed.2d 326 (1977), cited by Petitioner, has no application to this case. *Complete Auto Transit* involved a question of:

> " . . . the validity of a state tax for the privilege of carrying on, within a state, certain activities related to a corporation's operation of an interstate business." 430 U.S. at page 274.

This case does not involve any interstate business. All services which Arkansas seeks to tax are intrastate services performed entirely within Arkansas.

B.

THE ARKANSAS GROSS RECEIPTS (SALES) TAX SYSTEM DOES NOT VIOLATE PETITIONER'S CONSTITUTIONAL GUARANTEE OF EQUAL

PROTECTION BY EXEMPTING FROM THE TAX CERTAIN SERVICES PERFORMED IN ARKANSAS FOR OUT-OF-STATE CUSTOMERS WHILE TAXING SIMILAR SERVICES PERFORMED BY PETITIONER IN ARKANSAS ON PROPERTY OWNED BY OUT-OF-STATE CUSTOMERS.

Exemptions from the Arkansas Gross Receipts (Sales) Tax for the service of repairing railroad cars, watches, clocks, or telephone instruments, belonging to out-of-state customers, which are shipped into Arkansas for repair, do not violate the equal protection provisions of the Fourteenth Amendment. In *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522, 79 S.Ct. 437, 3 L.Ed.2d 480 (1959), the Supreme Court reviewed an Ohio statute which provided a tax exemption to:

> "merchandise or agricultural products belonging to a non-resident of this state . . . if held for storage only . . . ."

The Court held that the tax exemption did not deny equal protection of the laws to a resident of Ohio stating:

> ". . . It has long been settled that a classification, though discriminatory, is not arbitrary nor violative of the Equal Protection Clause of the Fourteenth Amendment if any state of facts reasonably can be conceived that would sustain it." 358 U.S. at page 528.

States have wide latitude in adopting tax imposition statutes and exemptions therefrom. In *Carmichael v. Southern Coal and Coke Company*, 301 U.S. 495, 57 S.Ct. 868, 81 L.Ed. 1245 (1937), the Court reviewed an exemption from the Alabama Unemployment Compensation Act for those who employ agricultural labor, domestic servants, seamen, close relatives, and government employees. All others who employed eight or more employees were required to contribute a percentage of an employees wages into the Alabama Unemployment Compensation Fund. The Court stated:

> "It is inherent in the exercise of the power to tax that a state be free to select the subjects of taxation and to grant exemptions." 301 U.S. at page 509.

Arkansas has exempted the repair of railroad equipment, watches, clocks and telephones repaired in the state for out-of-state customers while imposing the tax on all other repairs of property occurring within this State for out-of-state customers. However, an exemption for one industry or group of industries, which is not extended to other industries, does not violate the Fourteenth Amendment. In *Carmichael v. Southern Coal and Coke Company, supra*, the Court stated:

> " . . . Inequalities which result from a singling out of one particular class for taxation or exemption, infringe no constitutional limitations . . . . Like considerations govern exemptions from the operation of a tax imposed on the members of a class. A legislature is not bound to tax every member of a class or none. It may make distinctions of degree having a rational basis, and when subjected to judicial scrutiny they must be presumed to rest on that basis if there is any conceivable state of facts which would support it." 301 U.S. at page 509.

The *Carmichael* Court continued by recognizing that a state may exercise its power to tax to stimulate or encourage particular industries or business or may exercise its taxing power to discourage or suppress businesses which are not favored by the State, saying that:

> "Where the public interest is served one business may be left untaxed and another taxed, in order to promote the one . . . or to restrict or suppress the other." 301 U.S. at page 512.

In *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522, 79 S.Ct. 437, 3 L.Ed.2d 480 (1959), the Court recognized the ability of a state to encourage particular industries to locate within its boundaries through the use of tax exemptions

without violating the Fourteenth Amendment. There the Court stated:

> " . . . it has repeatedly been held and appears to be entirely settled that a statute which encourages the location within the State of needed and useful industries by exempting them, though not also others, from its taxes is not arbitrary and does not violate the Equal Protection Clause of the Fourteenth Amendment." 358 U.S. at page 528.

We do not know the reasons behind the adoption by the Arkansas Legislature of exemptions for services provided to out-of-state customers in repairing railroad equipment, watches, clocks and telephones. However, it is not necessary to understand the legislature's reasoning. As the Court stated in *Allied Stores of Ohio, Inc. v. Bowers, supra*,

> "We cannot assume that state legislative enactments were adopted arbitrarily or without good reason to further some legitimate policy of the State. What were the special reasons, motives or policies of the Ohio Legislature for adopting the questioned proviso we do not know with certainty, nor is it important that we should, *Southwestern Oil Company v. State of Texas*, 217 U.S. 114, 126, 30 S.Ct. 496, 500, 54 L.Ed. 688, for a State legislature need not explicitly declare its purpose. But it is obvious that it may reasonably have been the purpose and policy of the State Legislature, in adopting the proviso, to encourage the construction or leasing and operation of warehouses in Ohio by nonresidents with the attendant benefits to the State's economy, or to stimulate the market for merchandise and agricultural products produced in Ohio by enabling nonresidents to purchase and hold them in the State for storage only, free from taxes, in anticipation of future needs. Other similar purposes reasonably may be conceived. Therefore, we cannot say that the discrimination of the proviso which exempted only the 'merchandise or agricultural products belonging to a nonresident . . . if held in a storage warehouse for

> storage only' was not founded upon a reasonable distinction, or difference in state policy, or that no state of facts reasonably can be conceived to sustain it." 358 U.S. at page 528.-

It is conceivable that the Arkansas Legislature intended to encourage railroads, watch and clock companies or telephone companies as key industries within the State of Arkansas or as key industries in certain economically distressed areas of the State. These industries might also be exempted because they indirectly affect other industries which are important to the overall economic development of the State. Regardless of the actual reasons underlying the adoption of the exemption, a state of facts may be reasonably conceived to sustain the exemptions and the Fourteenth Amendment is not violated by either the exemption or the imposition of tax on other nonexempted services.

CONCLUSION

For the foregoing reasons, a Writ of Certiorari should not be issued to review the decision of the Arkansas Supreme Court and the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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